

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JEFFREY A. NELSON,

Plaintiff,

vs.

9:12-CV-422

BRUCE PLUMLEY, et al.,

Defendants.

Thomas J. McAvoy,
United States District Judge

DECISION & ORDER

This civil rights action pursuant to 42 U.S.C. § 1983 alleges violations of Plaintiff's constitutional rights as a New York State prison inmate. The action was referred to the Hon. David E. Peebles, United States Magistrate Judge, for a Report-Recommendation pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3(c). After previous motion practice, the Plaintiff's remaining claim is an excessive force claim against Defendants Berggren and Galani.

The Report-Recommendation, dated May 14, 2015, recommended that the Court find that Plaintiff's claims are not barred by the Prison Litigation Reform Act ("PLRA") based on a failure to exhaust administrative remedies, and that the matter be set down for trial. See dkt. # 83.

The Defendants filed timely objections to the Report-Recommendation.¹ When objections to a magistrate judge's Report-Recommendation are lodged, the Court makes a "*de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made." See 28 U.S.C. § 636(b)(1). After such a review, the Court may "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." Id.

Having reviewed the record *de novo* and having considered the issues raised in the Defendants' objections, this Court has determined to accept and adopt the recommendation of Magistrate Judge Peebles for the reasons stated in the Report-Recommendation.

It is therefore

ORDERED that the Defendants' objections to the Report-Recommendation of Magistrate Judge Peebles, dkt. # 85, are hereby OVERRULED. The Report-Recommendation, dkt. # 83, is hereby ADOPTED, and:

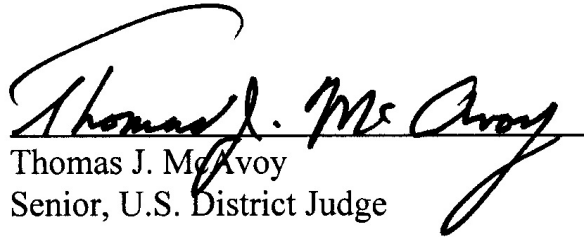
1. The Court finds that the Plaintiff's excessive force claim is not barred by the PLRA based upon Plaintiff's exhaustion of available administrative remedies before commencing suit; and

¹Plaintiff filed a document *pro se* he styles as "objections" to the Report-Recommendation. In that document, however, Plaintiff asks the Court to adopt the Report-Recommendation. See dkt. # 84. Moreover, Plaintiff was represented by counsel at the evidentiary hearing on the failure-to-exhaust issue, and counsel filed a brief in opposition to Defendants' objections to the Report-Recommendation. See dkt. #89. These filings make clear that Defendants' are the only actual objections to the Report-Recommendation.

2. The Court will set the matter down for trial by separate order.

IT IS SO ORDERED.

Dated: July 14, 2015



Thomas J. McAvoy
Senior, U.S. District Judge